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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

KAREN DAILY,

Plaintiff and Appellant,

v.

KAISER FOUNDATION HOSPITALS,

Defendant and Respondent.

B170235

(Los Angeles County
Super. Ct. No. BC234153)

APPEAL from an order of the Superior Court of Los Angeles County,
Jon M. Mayeda, Judge. Affirmed.

Law Offices of Helena S. Wise and Helena S. Wise for Plaintiff and
Appellant.

Seyfarth Shaw, F. Scott Page, and Edith Lee for Defendant and
Respondent.

INTRODUCTION

This is an appeal from an order denying a motion for attorney fees and costs. Plaintiff and appellant Karen Daily (Daily) successfully sued defendant and respondent Kaiser Foundation Hospital (Kaiser) on a common law cause of action for wrongful termination in violation of public policy. After the jury verdict was rendered, the trial court denied Daily's motion for attorney fees and costs. In this appeal, Daily contends the trial court erred in denying the motion. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Initial facts.*¹

Daily was employed for 22 years by Kaiser. From 1986, until her discharge on July 28, 1999, Daily worked in Kaiser's Home Health and Hospice Care Department (HHC). Daily achieved the position of Medical Social Worker III.

In 1998, Valerie Babisky became the Director of HHC. Mae Frances Henderson (Henderson) was HHC's assistant director and Sheila Jordan (Jordan) was the office manager.

In her position, Daily visited home-bound patients. The visits had to be ordered by a physician. A number of state and federal laws regulated the care. Observations and activities of the health care professionals were recorded on daily activity records (DARs). The Department of Health Services (the Department) and other agencies required other documents. According to the homecare health agency regulations contained in California Code of Regulations, Title 22 (Title 22), such records had to be filed in the patient's medical records within seven days.

Beginning in January 1999, Daily was issued a number of disciplinary notices for failing to meet documentation requirements, for inferior work, and for

¹ We have taken the facts from our opinion in Case No. B167858.

failing to meet productivity standards. Much of the criticism contained in the disciplinary notices lacked substance.

a. Notification to the Department for the breach of confidentiality.

On July 6 or 7, 1999, Daily saw Jordan's eight or nine-year-old son photocopying DARs. Daily immediately paged Babisky, who did not respond. Daily learned from her union representative that there were strict confidentiality rules and children should not have access to confidential medical records. The union representative told Daily to inform the Department of this breach of Title 22. Daily told Henderson she was contacting the Department because Kaiser was violating the regulation by allowing non-medical persons to be near medical charts. Daily called the Department and reported the breach of patient confidentiality. Henderson told Babisky about the situation, including that Daily was making a report to the Department.

b. Other events leading to Daily's discharge.

From July 9, 1999, until the time Daily was fired, Daily wrote a number of memorandums to management about problems relating to missing charts and accessing information. Henderson knew losing patients' charts violated Title 22. Additionally, Daily repeatedly raised with management a number of concerns relating to patient care and treatment. One such report was made in July 1999, two days after Daily contacted the Department regarding the breach of confidentiality. Daily also reported problems with supplies patients received, her ability to procure supplies, and insufficient reporting elder abuse to adult protective services.

On July 9, 1999, Daily asked management for written directions with regard to how she should complete the required documentation. Kaiser gave Daily a plan of action to teach Daily how to complete the DARs, but Kaiser never provided Daily with any instruction in this regard.

On July 12, 1999, a notice of discipline accused Daily of making visits to a patient without doctor authorization.

On July 22, 1999, Daily was suspended and on July 28, 1999, Daily was discharged.

c. Pretextual reasons presented for the discharge.

Kaiser claimed Daily was fired for a number of reasons including, poor performance, late and incorrect paperwork, low productivity, visits to patients without physician orders, inadequate reporting on DARs, insufficient number of weekly visits, and failure to properly complete documentation.

The proffered reasons were pretextual. The real motive for the termination decision was in retaliation for Daily's complaints about patient care issues, including the mishandling of patients' charts, loss of medical records, failures to provide equipment and supplies, and breaches of confidentiality. This included her whistle-blowing to the Department.

2. Procedure.

On July 28, 2000, Daily filed her initial complaint against Kaiser. As amended in April, 2001, her complaint alleged (1) common law wrongful termination in violation of public policy, (2) age discrimination, (3) race discrimination, and (4) wrongful termination in violation of the Fair Employment and Housing Act. In the prayer for damage, with regard to all causes of action, Daily sought loss wages; general damages, including emotional distress damages; special damages; punitive damages; and costs of suit. With regard to the third and fourth causes of action, Daily also sought attorney fees. Daily did *not* seek attorney fees with regard to her common law cause of action for wrongful termination.

The case was tried to a jury only on the first and third causes of action, common law wrongful termination and race discrimination.

On February 19, 2003, the jury rejected Daily's race discrimination claim, but found in favor of Daily on the common law wrongful termination cause of action. In a special verdict, the jury found Kaiser would not have terminated

Daily's employment, but for the fact that she had complained about patient care issues.²

The jury awarded Daily \$941,300 for economic damages (including lost compensation) and \$150,000 for emotional distress damages.

On April 7, 2003, judgment was entered in favor of Daily.

Attorney Wise represented Daily before and during trial.

3. Post trial proceedings.

On June 6, 2003, Daily filed a motion for attorney fees and costs. The motion was brought on the grounds that through her successful lawsuit, Daily had raised "issues of substantial public concern and in the public interest, and should be entitled to reasonable attorney fees and costs, including pursuant to Code of Civil Procedure Section 1021.5 and Health and Safety Code Section 1278.5."

The trial court denied the motion on July 15, 2003.

4. Kaiser's appeal.

On June 5, 2003, Kaiser appealed from the adverse judgment rendered against it. (Case No. B167858.) Daily hired appellate counsel to oppose Kaiser's appeal from the adverse judgment. Daily argued she had tethered her common law cause of action for wrongful termination to Labor Code section 1102.5 and to Title 22, section 74743. These arguments were to oppose Kaiser's contention that Daily had failed to prove her common law cause of action because Daily had

² In the special verdict, the jury found that Daily had proven "by a preponderance of the evidence that [Kaiser] would not have terminated her employment but for the fact that she had complained of patient care issues[.]" The jury listed the following as the public policy violations for which Daily was terminated: "Raising patient care issues regarding mishandling and loss of patients charts, medical records, including orders[,] failure to provide equipment and supplies to the patient timely, breach of patient confidentiality, alteration of patient records."

The jury also found Daily had proven, by clear and convincing evidence that Jordan and Babisky had acted with malice, fraud or oppression. However, Daily was not awarded any punitive damages as she did not offer admissible evidence on this issue during the punitive damages phase of the trial.

failed to articulate the constitutional, statutory, or regulatory basis for the cause of action and failed to provide a nexus between the termination and Kaiser's violation of any constitutional, statutory, or regulatory provision.³

Labor Code section 1102.5, the whistleblower protection statute, precludes employers from retaliating against an employee who communicates with governmental or law enforcement agencies "where the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation or noncompliance with a state or federal rule or regulation." (Lab. Code, § 1102.5, subds. (a), (b), Stats. 1984, ch. 1083, § 1.)⁴

³ Although an at-will employee may be fired with or without cause, the termination decision may not violate a fundamental public policy. (*Gantt v. Sentry Insurance* (1992) 1 Cal.4th 1083, 1094; *Grinzi v. San Diego Hospice Corp.* (2004) 120 Cal.App.4th 72, 79.) "The public policy that is violated must be one that is delineated by constitutional, statutory, or regulatory provisions. [Citations.]" (*Jersey v. John Muir Medical Center* (2002) 97 Cal.App.4th 814, 821.) The public policy must be tethered to the discharge. (*Esberg v. Union Oil Co.* (2002) 28 Cal.4th 262, 271-272; *Stevenson v. Superior Court* (1997) 16 Cal.4th 880, 889; *Green v. Ralee Engineering Co.* (1998) 19 Cal.4th 66, 71, 80, fn. 6 [overruling statement in *Gantt v. Sentry Insurance*, *supra*, at p. 1095 to the extent *Gantt* suggested the public policy cannot be tethered to a regulation].)

⁴ At the time of Daily's discharge, Labor Code section 1102.5 read as follows:

"(a) No employer shall make, adopt, or enforce any rule, regulation, or policy preventing an employee from disclosing information to a government or law enforcement agency, where the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or violation or noncompliance with a state or federal regulation.

"(b) No employer shall retaliate against an employee for disclosing information to a government or law enforcement agency, where the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or violation or noncompliance with a state or federal regulation.

"(c) This section shall not apply to rules, regulations, or policies which implement, or to actions by employers against employees who violate, the confidentiality of the lawyer-client privilege of Article 3 (commencing with Section 950), the physician-patient privilege of Article 6 (commencing with

Title 22, section 74743, addresses home health agencies. In addition to other regulations regarding patients, it protects the confidentiality of the clinical records maintained by the agency. (*Id.* at section (d).)⁵

In Case No. B167858, we affirmed the judgment insofar as it found Kaiser liable on the *common law* cause of action for wrongful termination. We held, in part, that Daily had tethered her cause of action to Labor Code section 1102.5. We noted that Daily had used this statute in successfully defeating Kaiser’s summary judgment motion and that the statute was identified at the top of a pivotal jury instruction. Further, the substance of section 1102.5 was mentioned in the complaint, in argument to the jury, and was connected to Daily’s theory that her discharge was in retaliation for her report to the Department that Jordan’s son handled and photocopied confidential patient medical records. While we did not rest our decision on Title 22, we noted that Daily had discussed this regulation in opposing Kaiser’s motion for summary judgment and there was testimony that Jordan’s son’s actions violated Title 22’s requirement of client confidentiality.

5. The instant appeal.

Our opinion in Case No. B167858 did not address the issue before us, i.e., whether the trial court erred in denying Daily’s motion for attorney fees and costs. This issue was raised separately in a notice of appeal filed on September 12, 2003, by attorney Wise, on her own behalf.

Section 990) of Chapter 4 of Division 8 of the Evidence Code, or trade secret information.” (Added by Stats. 1984, ch. 1083, § 1.)

Labor Code section 1102.5 was subsequently amended. (Stats. 2003, ch. 484, § 2.)

⁵ Title 22, section 74743, subdivision (d) states: “The patient has the right to be informed of his or her rights. The home health agency must protect and promote the exercise of these rights. . . . (d) Confidentiality of medical records. [¶] (1) The patient has the right to confidentiality of the clinical records maintained by the home health agency. [¶] (2) The home health agency must advise the patient of the agency’s policies and procedures regarding disclosure of clinical records.”

Kaiser filed a motion to dismiss the appeal contending attorney Wise lacked standing. We denied the motion, but deferred the question of standing pending resolution of the appeal.

Attorney Wise and Kaiser's counsel appeared at oral argument on the issues of attorney fees and costs. At that time we deferred ruling and permitted Daily an opportunity to clarify the standing issue.

Thereafter, we issued an order acknowledging that we had "received the substitution of attorneys filed on behalf of Karen Daily. In light of [that] document, [we] determined that attorney Wise [would be] permitted to appear on behalf of Karen Daily." Additionally, we asked the parties to submit further briefing on whether Health and Safety Code section 1278.5 should be applied retroactively, an issue that had been raised in the appellate briefs.

DISCUSSION

1. *Contentions.*

Daily contends attorney fees and costs should have been awarded under the private attorney general theory, as now codified in Code of Civil Procedure section 1021.5. She also contends an award was proper pursuant to Health and Safety Code section 1278.5. We conclude that neither argument is persuasive and affirm.

2. *Code of Civil Procedure section 1021.5.*

Code of Civil Procedure section 1021.5 codified the private attorney general theory. Orders denying attorney fees pursuant to section 1021.5 are ordinarily reviewed for abuse of discretion. (*Graham v. DaimlerChrysler Corp.* (2004) 34 Cal.4th 553, 578; *Baxter v. Salutary Sportsclubs, Inc.* (2004) 122 Cal.App.4th 941, 944; *Flannery v. California Highway Patrol* (1998) 61 Cal.App.4th 629, 634.)

In addition to other requirements, Code of Civil Procedure "section 1021.5 requires both a finding of a significant benefit conferred on a substantial number of people and a determination that the 'subject matter of the action implicated the

public interest.’ [Citation.]” (*Graham v. DaimlerChrysler Corp.*, *supra*, 34 Cal.4th at p. 578.)⁶

During the hearing on Daily’s motion for attorney fees and costs, the trial court stated it did not “think . . . that the primary purpose of bringing this case was to benefit the public, it was for [Daily] to get damages and/or get some kind of compensation for what happened to her.”

As the trial court found, the jury verdict in favor of Daily did not confer a significant benefit upon the general public. Rather, it was a suit primarily brought to compensate Daily for her losses, including lost wages. (See e.g., *Flannery v. California Highway Patrol*, *supra*, 61 Cal.App.4th at p. 635 [fees under section 1021.5 rejected because plaintiff’s primary purpose was vindication of her own personal right and economic interest]; *Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1170-1171 [sexual harassment case brought to vindicate plaintiff’s personal rights and economic interests]; compare with *Edgerton v. State Personnel Bd.* (2000) 83 Cal.App.4th 1350, 1362 [action helped preserve a significant public benefit].)

Thus, the trial court did not abuse its discretion in denying the motion for attorney fees pursuant to Code of Civil Procedure section 1021.5.

3. *Health and Safety Code section 1278.5, subdivision (g).*

Health and Safety Code section 1278.5 (Section 1278.5) was enacted in 1999 and became effective January 1, 2000. (Stats. 1999, ch. 155, § 1.) Prior to its enactment, other statutes, such as Labor Code section 1102.5, protected

⁶ Code of Civil Procedure section 1021.5 provides in part: “Upon motion, a court may award attorneys’ fees to a successful party against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest if: (a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons, (b) the necessity and financial burden of private enforcement, or of enforcement by one public entity against another public entity, are such as to make the award appropriate, and (c) such fees should not in the interest of justice be paid out of the recovery, if any.”

whistleblowers who reported to a governmental agency purported violations of state statutes, federal statutes, or violation or noncompliance with a state or federal regulation. (See fn. 4.) Neither the current version of Labor Code section 1102.5, nor the version in effect in 1999 had an attorney fee provision. (Stats. 1984, ch. 1083, § 1, amended by Stats. 2003, ch. 484, § 2.) Additionally, Health and Safety Code section 1432 prohibited *long-term health care* facilities from discriminating or retaliating against patients or employees of those facilities who complained or cooperated with governmental agencies relating to the case, services, or conditions at these facilities. Neither the current version of Health and Safety Code section 1432, nor the version in effect in 1999 had an attorney fee provision. (Stats. 1984, ch. 1625, § 4; Stats. 1984, ch. 1631, § 5; Stats. 2001, ch. 685, § 20.)

Section 1278.5 was proposed by the California Nurses Association. (Assem. Com. on Health, hearing date Jun. 15, 1999.) It was intended to extend to other health care providers the protections available to long term health care facilities in Health and Safety Code section 1432. (Sen. Com. on Health & Human Services Analysis of Sen. Bill 97, mem. prepared for hearing date of Mar. 10, 1999; Assem. Com. on Appropriations, hearing date Jun. 23, 1999.)

In enacting Section 1278.5, the Legislature stated that the statute was intended to further the public policy of encouraging “patients, nurses, and other health care workers to notify government entities of suspected unsafe patient care and conditions.” (§ 1278.5, subd. (a).) Nothing in Section 1278.5 was to abrogate or limit “any other theory of liability or remedy otherwise available at law.” (§ 1278.5, subd. (j).)⁷

⁷ Section 1278.5 reads:

“(a) The Legislature finds and declares that it is the public policy of the State of California to encourage patients, nurses, and other health care workers to notify government entities of suspected unsafe patient care and conditions. The Legislature encourages this reporting in order to protect patients and in order to

[Footnote continued on next page]

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assist those government entities charged with ensuring that health care is safe. The Legislature finds and declares that whistleblower protections apply primarily to issues relating to the care, services, and conditions of a facility and are not intended to conflict with existing provisions in state and federal law relating to employee and employer relations.

“(b)(1) No health facility shall discriminate or retaliate in any manner against any patient or employee of the health facility because that patient or employee, or any other person, has presented a grievance or complaint, or has initiated or cooperated in any investigation or proceeding of any governmental entity, relating to the care, services, or conditions of that facility.

“(2) A health facility that violates this section shall be subject to a civil penalty of not more than twenty-five thousand dollars (\$25,000). The civil penalty shall be assessed and recovered through the same administrative process set forth in Chapter 2.4 (commencing with Section 1417) for long-term health care facilities.

“(c) Any type of discriminatory treatment of a patient by whom, or upon whose behalf, a grievance or complaint has been submitted, directly or indirectly, to any governmental entity or received by a health facility administrator within 180 days of the filing of the grievance or complaint, shall raise a rebuttable presumption that the action was taken by the health facility in retaliation for the filing of the grievance or complaint.

“(d) Any discriminatory treatment of an employee who has presented a grievance or complaint, or has initiated, participated, or cooperated in any investigation or proceeding of any governmental entity as specified in subdivision (b), if the health facility had knowledge of the employee’s initiation, participation, or cooperation, shall raise a rebuttable presumption that the discriminatory action was taken by the health facility in retaliation, if the discriminatory action occurs within 120 days of the filing of the grievance or complaint. For purposes of this section, ‘discriminatory treatment of an employee’ shall include discharge, demotion, suspension, any other unfavorable changes in the terms or conditions of employment, or the threat of any of these actions.

“(e) The presumptions in subdivisions (c) and (d) shall be presumptions affecting the burden of producing evidence as provided in Section 603 of the Evidence Code.

“(f) Any person who willfully violates this section is guilty of a misdemeanor punishable by a fine of not more than twenty thousand dollars (\$20,000).

[Footnote continued on next page]

Pursuant to Section 1278.5, a health facility that violates the section shall be subject to a civil penalty of no more than \$25,000 (§ 1278.5, subd. (b)(2)) and persons who willfully violate Section 1278.5 are guilty of misdemeanors and a fine of no more than \$20,000. (§ 1278.5, subd. (f).) Additionally, subdivision (g) states that “An employee who has been discriminated against in employment *pursuant to this section* shall be entitled to reinstatement, reimbursement for lost wages and work benefits caused by the acts of the employer, and the legal costs associated with pursuing the case.” (Emphasis added.)

Daily’s cause of action accrued on July 28, 1999, when she was discharged. Section 1278.5 was enacted in 1999, and became effective January 1, 2000. (Stats. 1999, ch. 155, § 1.) Daily filed her initial complaint seven months later, on July 28, 2000. Daily’s complaint was amended on April 24, 2001.

In her initial complaint and in her subsequently filed amended complaint Daily did *not* include a cause of action based upon Section 1278.5, a statute specifically designed to expand the protections provided by other statutes. Daily *only* sued on a *common law* cause of action for wrongful termination in violation of public policy and as to that cause of action, Daily *did* not seek attorney fees. It does not appear that Daily ever sought to add a *statutory* cause of action for

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“(g) An employee who has been discriminated against in employment *pursuant to this section* shall be entitled to reinstatement, reimbursement for lost wages and work benefits caused by the acts of the employer, and the legal costs associated with pursuing the case.

“(h) This section shall not apply to an inmate of a correctional facility of either the Department of the Youth Authority or the Department of Corrections or to an inmate housed in a local detention facility including a county jail or a juvenile hall, juvenile camp, or other juvenile detention facility.

“(i) This section shall not apply to a health facility that is a long-term health care facility, as defined in Section 1418. A health facility that is a long-term health care facility shall remain subject to Section 1432.

“(j) Nothing in this section abrogates or limits any other theory of liability or remedy otherwise available at law.” (Italics added.)

wrongful termination. It does not appear that Daily sought to amend her complaint to request attorney fees with regard to her common law wrongful termination cause of action. As we discussed in Case No. B167858, Daily tethered her common law cause of action to Labor Code section 1102.5, and possibly to Title 22. Even though her complaint was filed seven months *after* the effective date of Section 1278.5, Daily never suggested Kaiser violated Section 1278.5, or that her wrongful discharge cause of action was tethered to this Health and Safety Code section. Daily raised Section 1278.5 only after trial, in her motion for attorney fees and costs.⁸

Thus, Daily never pursued a *statutory* cause of action for wrongful termination. Daily did not pursue her wrongful termination case *pursuant to* Section 1278.5. (§ 1278.5, subd. (g) [stating that employee who was “discriminated against in employment pursuant to this section shall be entitled to . . . the legal costs associated with pursuing the case”]; cf. *U. S. v. Stone Container Corp.* (9th Cir. 1999) 196 F.3d 1066, 1068-1069 [party seeking attorney fees under particular statute must have brought claim “pursuant to” that statute, as the statute specified].) Rather, Daily rested her wrongful discharge cause of action solely upon a common law cause of action in which she did not seek attorney fees. Having prevailed on that common law cause of action, Daily is foreclosed from belatedly arguing (after a verdict is rendered) that she is entitled to attorney fees and costs based upon a statutory claim.

For reasons unbeknown to this court, Daily never put before the jury the suggestion that Kaiser’s actions violated Section 1278.5, even though the statute was enacted prior to the complaint being filed and even though such an argument would parallel many of her Title 22 and Labor Code section 1102.5 arguments.

⁸ Section 1278.5 permits an award of “legal costs.”

Daily focuses on attorney fees and not costs. She does not suggest that if she is not entitled to attorney fees under Section 1278.5, she is nonetheless entitled to costs under this statute.

We will not second guess this tactical decision. Daily did not raise a statutory cause of action for wrongful termination. Thus, she cannot seek statutory remedies under that statute.⁹

In light of our conclusion, we need not address Daily's argument that a retroactive application of subdivision (g) of Section 1278.5 enables her to obtain attorney fees and costs. For this proposition, Daily cites to a number of cases including, *Bradley v. Richmond School Board* (1974) 416 U.S. 696, *California Housing Finance Agency v. E.R. Fairway Associates I* (1995) 37 Cal.App.4th 1508, *Harbor View Hills Community Assn. v. Torley* (1992) 5 Cal.App.4th 343, *Kievlan v. Dahlberg Electronics, Inc.* (1978) 78 Cal.App.3d 951, and *Olson v. Hickman* (1972) 25 Cal.App.3d 920. These cases and their discussion do not address the facts before us.

Thus, the trial court did not err in denying Daily's request for attorney fees and costs pursuant to Section 1278.5.

DISPOSITION

The order denying attorney fees and costs is affirmed. Daily is to pay costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ALDRICH, J.

We concur:

CROSKEY, Acting P. J.

KITCHING, J.

⁹ The fact that during the legislative process Kaiser opposed the enactment of Section 1278.5 is of no consequence. Kaiser's knowledge that the statute was enacted is no substitute for being put on notice that Daily was suing pursuant to it.